

Distributive Justice: Some Institutional Implication of Rawls' *A Theory of Justice*

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Distributive justice combines philosophy, economics, and jurisprudence in an attempt to establish the fundamental theory by which wealth and resources are allocated among the members of a society. The need for a rationally based distributive system to allocate resources in an organized society arises from the insufficiency of available resources to fulfill the conflicting desires of society members. Despite the adoption of various distributive theories through the centuries, the question of what constitutes a just distributive system remains unanswered.

Utilitarianism, egalitarianism, socialism, and Marxism are among the theories which have had the greatest impact on modern social thinking. These theories are complex, and criticism of their assumptions and implications is outside the scope of this article. They are mentioned merely to indicate the central role in structuring a society's institutions played by the basic theory of distributive justice adopted. It is undeniable that the search for more coherent theories of distributive justice continues and that the need for more acceptable and workable alternatives is a real one, particularly in an era of changing social values and political organizations, and global allocation of scarce economic and natural resources. The objective of this article is to analyze the distributive justice concepts developed by John Rawls,¹ and to discuss the adaptation of such concepts to the American experience by briefly examining the implications of Rawls's theory for some basic institutions of this society.

I. FAILURES OF THE AMERICAN DISTRIBUTIVE JUSTICE SYSTEM

The United States has long benefited from a state of abundance and the implementation and operation of reasonably just institutions, which have created a situation of relative well being and just distribution in comparison to other nations. Nevertheless, the need for change and revitalization of some traditional American ideals is becoming increasingly apparent. The civil rights movement, the national perception that our participation in the war in Southeast Asia was wrong, the manifest disaffection with a political process dependent upon and distorted by privately raised campaign funds, the growing realization that our penal systems are not only inhumane but ineffective, and the consumer movement, are but a few indications of a culture seeking to implement a renewed and refined standard of justice in its institutions. But debate on these and similar issues has seldom proceeded from a commonly held sense of justice; for

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¹ J. RAWLS, *A THEORY OF JUSTICE* (1971).

that reason, proposed remedies have not often been generally acceptable and workable. Thus, it should not be surprising that divisions among people of good will are many, confusion and lack of purpose are prevalent, and confidence in our institutions is declining.

Relatively recent political efforts such as the New Deal and the War on Poverty² have made halting steps toward implementing a more just distribution of goods in our society, but with little fundamental or long lasting success. The great and growing inequalities of distribution in America and the world can no longer be justified to most members of our society. One indication of the unjust distribution of goods is the persistent and growing maldistribution of wealth. Although measurement of the degree of economic inequality is crude in light of the countless factors which must be considered,³ research to date indicates a grossly unjust and unjustifiable distribution of wealth.⁴

One study⁵ found that 1.6 percent of our population owned about thirty-two percent of all privately owned wealth, 82.2 percent of all stock, one hundred percent of tax exempt bonds, 38.2 percent of all federal bonds, 88.5 percent of other kinds of bonds, 29.1 percent of all cash, and 22.1 percent of all debts and mortgages. Subsequent studies indicate the concentration of wealth in a few hands may be intensifying.⁶ Statistically, the top ten percent of the American population receives twenty-eight percent of the income while the bottom ten percent receives two percent of the income, a ratio of fourteen to one that has persisted for several decades.⁷ Other indications of distributive injustice in the United States abound. For example, the social security expenditures of European community countries are approximately fourteen percent of their gross national product, and those of Canada ten percent, while the United States spends only 6.5 percent.

Examined on a worldwide basis, the statistics — even though they are crude and perhaps misleading — are truly appalling. Fully sixty percent of the world's population has an annual income of less than \$310 per year in terms of 1970 U.S. dollars. Although these numbers are not easily translated into the American standard of living, one expert in the field has stated:

The inescapable conclusion is that the benefits of economic progress have been confined to a minority of the world's population. The application

² See Smolensky, *Poverty, Propinquity and Policy*, 409 ANNALS 120 (1973).

³ See Boulding, *Equality and Conflict*, 409 ANNALS 1 (1973).

⁴ See Symposium, *Income Inequality*, 409 ANNALS 1-173 (1973).

⁵ R. LAMPMAN, CHANGES IN THE SHARE OF WEALTH HELD BY TOP WEALTH-HOLDERS, 1922-56 (Nat'l Bureau of Economic Research, Inc., Occasional Paper 71, 1960). The data cited in text was for 1953. *Id.* at 6.

⁶ F. LUNDBERG, THE RICH AND THE SUPER-RICH 11 (1968); Lampman, *Measured Inequality of Income: What Does It Mean and What Can It Tell Us*, 409 ANNALS 81, 82 (1973).

⁷ Lampman, *supra* note 6, at 82.

⁸ Heilbroner, *The Roots of Social Neglect in the United States*, in *IS LAW DEAD* 288 (E. Rostow ed. 1971).

of modern science and technology has not, nearly three-quarters of the way through the twentieth century, provided anything which approximates the western minimum standard of living for the substantial majority of the human race.⁸

Aside from any concepts of justice, such gross maldistribution and human suffering is dangerous to the stability of existing institutions. It should not be surprising that a 1973 poll found that more than three-fourths of the American people believe the rich get richer, and the poor, poorer; almost the same number believe that special interests get more out of the government than the people do. The depth of alienation from our institutions and leadership, and the degree to which individuality has become submerged in our society was indicated by the belief of sixty-one percent of those surveyed that their opinions have little influence and the belief of fifty-five percent that the people running the country do not care what happens to them. The results of this poll led the *Wall Street Journal* to opine, "America may be ripe for the man on horseback."⁹ Clearly, the maldistribution of wealth and perceptions of injustice just described require a reassessment of the goals and distributive principles followed by this society. That the distribution of wealth in America is relatively just in comparison to the rest of the world should not obscure the need for change nor blunt the search for alternative systems to accomplish that change. A widespread acceptance of changes and restructuring of the socio-economic system is dependent upon the adoption of some new ideal of distributive justice with solid philosophical and rational foundations. Although it would be desirable to suggest such changes on the basis of principles derived from unassailable premises, that luxury is not available in the area of distributive justice.¹⁰ All theories are subject to criticism on a philosophical and rational level and, if implemented in past or present social systems, to criticism for their practical results. Among the possible alternatives for a distributive process, the concepts of socialism¹¹ and Marxism¹² must be eliminated as viable political alternatives for

⁸ Otten, *Politics and People*, The Wall Street Journal, Jan. 10, 1974, at 10, col. 3.

¹⁰ As Felix Cohen has observed, "truth on earth is a matter of degree, and . . . whatever may be the case in Heaven, a terrestrial major league batting average above .300 is nothing to be sneezed at." Cohen, *Field Theory and Judicial Logic*, 59 YALE L.J. 238, 268 (1950).

¹¹ The socialist formula can be simply stated as: A just distributive system is one in which everyone produces according to his ability and receives according to his need. This formula, attributed to the French socialist Louis Blanc, is usually criticized as not providing for sufficient incentive or reward for merit. For a general criticism of socialism, see N. BOWIE, *TOWARDS A NEW THEORY OF DISTRIBUTIVE JUSTICE* 77-99 (1971).

¹² Marxism is more complex than socialism because it divides the distributive theory into two phases: the first to be applied during a period of economic development, the other during a subsequent period of abundance. *Id.* at 79. In the preabundance phase, the distribution of wealth gives to each person according to his work without any value being retained by the employer. See K. MARX, *CAPITAL* chs. 9, 12, 19 (1906). In the second phase, the distributive formula is essentially that of socialism. Marxism is subject to the same criticisms as socialism, note 11 *supra*, and is also criticized for its inefficiency and for ignoring important distributive factors such as health, family size, and special needs. Moreover, experience seems to indicate that the drive in a

American society. The American people do not now seem disposed to accept the extensive regulatory emphasis of a socialist or Marxist method of organizing economic activity. The complexity of the American economy and periodic experience with such pervasive government regulation as wage and price controls indicate that public policy favoring a free market will remain the major ingredient for organizing American economic activity for the foreseeable future. For many of the same reasons, egalitarian principles¹³ do not seem a viable alternative. Utilitarianism,¹⁴ which is probably generally accepted by most Western societies, seems unsupportable in light of the extremely unequal distributions which it would allow and the growing awareness of the excesses of maximizing measurable economic pleasures to the injury or exclusion of other values a mature society should promote. An alternative theory of distributive justice is proposed by John Rawls in his book, *A Theory of Justice*.¹⁵

Rawls rejects functional or negative approaches to the development of a theory of distributive justice in favor of a rational approach, which attempts to explain our intuitive convictions of the best political system. His theory articulates the American ideal of a written constitution guaranteeing liberty and equality of opportunity by fragmenting and controlling power in society through institutional devices. Rawls's work deals primarily with the search for, and statements of, the principles of justice which should regulate the institutions of a just society; it does not attempt to explore the intricacies of individual justice¹⁶ or to explain how social arrangements have come about. Rawls believes that the main function of a set of principles of justice is to define just procedures to be applied to concrete situations instead of providing a direct solution for such problems.

Marxist society for an economically classless society is incompatible with the objective of maximizing individual liberty.

¹³ Egalitarianism, in whatever form expressed, either requires an equal distribution scheme or allows an unequal one only if it is not based upon consideration of special merits or talents. It also de-emphasizes the psychological imperatives of incentives. The primary criticism of such a model is that it is inefficient in an economic sense. For various formulations of the egalitarian principle and its criticism, see N. BOWIE, *supra* note 11, at 50-76.

¹⁴ The principal tenet of utilitarianism can be stated as: "In a set of possible distributions, that distribution which will provide the greatest happiness for the greatest number is the one which is just." *Id.* at 12. Two primary weaknesses make acceptance of the doctrine doubtful. First, it is almost impossible to measure happiness in a meaningful way; hence the problem of maximizing happiness is not amenable to an actual solution. Second, distributive systems can be created which would satisfy the doctrine but would not appeal to any presently held sense of justice. The utilitarian doctrine was first developed in what is known as the classical form and was later modified into the "average utilitarianism." Classical utilitarianism is concerned with the maximum satisfaction of the largest number of people. See H. SIDGWICK, *THE METHOD OF ETHICS* (7th ed. 1907). The disadvantage of classical utilitarianism is that a decreasing average amount of individual satisfaction is permissible so long as an ever increasing population results in an ever increasing total satisfaction. Average utilitarianism corrects the major flaw by requiring that the average individual satisfaction be maximized. See J. MILL, *UTILITARIANISM* (1957). For a brief explanation of utilitarianism and its inherent problems, see N. BOWIE, *supra* note 11, at 12-49.

¹⁵ J. RAWLS, *supra* note 1.

¹⁶ "I shall not consider the justice of institutions and social practices generally . . ." *Id.* at 7.

Rawls' theory of justice is founded upon the social contract tradition of Locke, Rousseau, and Kant,¹⁷ and is offered as an alternative to the utilitarian tradition of Hume, Smith, Bentham, and Mill. The greatest virtue of his work is that it formalizes and gives some rational support to ideas and ideals which are widely held. In this respect, his conclusions, although they may appear radical to some, have the advantage of being capable of incorporation into existing constitutional systems without the trauma of dramatic change. The aim of this article is to analyze briefly the standards of justice which Rawls derives and to suggest how some existing institutions of American society could be modified, within the practical limitations of present political and social realities, to approach the ideals of Rawls's theory.

Criticism of such a sophisticated and impressive exercise of rational thought in an article directed primarily toward the practical implications of the theory of distributive justice advocated is necessarily superficial and possibly misleading. The intent is simply to outline Rawls's main contributions to distributive theories and at the same time to focus on the areas of his work which may be debatable. An analysis of some of the possible weaknesses should allow at least a superficial comparison of Rawls's principles with more familiar theories and facilitate a better understanding of his work. The analysis is undertaken in the expectancy that the serious reader will be sufficiently intrigued to read Rawls's work in the following well-stated spirit of constructive criticism:

Legal philosophy is not a bad play in which each actor clears the stage by killing off his predecessors. Rather is legal philosophy, like philosophy generally, a great cooperative exploration of possible perspectives (*Weltanschauungen*) through which life's many-faceted problems can be viewed. Progress in legal philosophy does not depend upon rejection of the insights that came to Plato and Aristotle, any more than progress in poetry depends upon rejection of Homer, or progress in music upon contempt for Bach or Beethoven. Nor is it necessary to assume, in the fashion popularized by Hegel and Pound, that every 'school' (perish the thought) of jurisprudence supersedes its predecessors. The history of legal philosophy is not, as some of Pound's writings have suggested, a sad history of successive errors, each thesis producing, in Hegelian-Marxian fashion, its own antithesis and destruction, until, by a series of stages, we come to the ultimate product of the juristic mind, sociological jurisprudence, after which anything different must be considered as one of time's typographical errors.¹⁸

II. RAWLS'S APPROACH TO DISTRIBUTIVE JUSTICE

A. Methodology

Rawls attempts to achieve his principles of justice through a rational process, beginning with several assumptions which he believes are neces-

¹⁷ "My aim is to present a conception of justice which generalizes and carries to a higher level of abstraction the familiar theory of the social contract as found, say, in Locke, Rousseau, and Kant." *Id.* at 11.

¹⁸ Cohen, *supra* note 10.

sary to the derivation of just and fair principles. He assumes, for example, that the parties contracting for the principle of justice are dealing in a purely hypothetical situation called the "original position."¹⁹ The parties in the original position are assumed to be rational individuals²⁰ who will use whatever information is available to them in a rational manner.

To eliminate natural bias so that the parties may derive just principles, Rawls imposes certain limitations on the information available to the parties by means of a "veil of ignorance."²¹ It should be noted that Rawls's choice of information excluded by the veil is such that the parties will assuredly reach the results he believes in. For example, the parties have no knowledge of their position in society, their fortune in the distribution of natural assets, such as intelligence and strength, their conception of good, or their psychological propensities.²² Rawls argues that

[t]his ensures that no one is advantaged or disadvantaged in the choice of principles by the outcome of natural chance or the contingency of social circumstances. Since all are similarly situated and no one is able to design principles to favor his particular condition, the principles of justice are the result of a fair agreement or bargain.²³

To allow the parties in the original position to make some kind of choice, they are allowed to

know the general facts about human society. They understand political affairs and the principles of economic theory; they know the basis of social organization and the laws of human psychology. Indeed, the parties are presumed to know whatever general facts affect the choice of the principles of justice. There are no limitations on general information, that is, on general laws and theories, since conceptions of justice must be adjusted to the characteristics of the systems of social cooperation which they are to regulate, and there is no reason to rule out these facts.²⁴

Rawls also assumes that the parties are incapable of envy²⁵ and that they have no mutual interest in each other.²⁶ The final major assumption is

¹⁹ [T]he original position of equality corresponds to the state of nature in the traditional theory of the social contract. This original position is not, of course, thought of as an actual historical state of affairs, much less as a primitive condition of culture. It is understood as a purely hypothetical situation characterized so as to lead to a certain conception of justice.

J. RAWLS, *supra* note 1, at 12; see *id.* at 11, 18, for further elaboration.

²⁰ "I have assumed throughout that the persons in the original position are rational." *Id.* at 142.

²¹ See *id.* at 12, 18-19, for a discussion of the concept of the veil of ignorance.

²² *Id.* at 12. For other formulations of the veil of ignorance, see *id.* at 18, 136-42, 172, 200.

²³ *Id.* at 12.

²⁴ *Id.* at 137-38.

²⁵ "The special assumption I make is that a rational individual does not suffer from envy. He is not ready to accept a loss for himself if only others have less as well." *Id.* at 143. Rawls argues that envy tends to make everyone worse off and therefore it would not be rational for men seeking to further their own interests to have feelings of envy. *Id.* at 144.

²⁶ The assumption of mutually disinterested rationality, then, comes to this: the persons in the original position try to acknowledge principles which advance

that there are some "primary goods,"²⁷ including wealth, liberty, and power, which rational men would certainly desire.

Before the results of the hypothetical bargaining process of the parties in the original position are considered, it is necessary to discuss the implications of the original position, the surrounding assumptions, and the methodology adopted by Rawls.

Rawls assumes that there are widely held principles common to a majority of people. Without questioning the validity of these principles, Rawls proceeds to operate upon them through a rational process which leads to development of more principles and philosophical arrangements. These, of necessity, must support the original principles, and possible inconsistencies are eliminated by a reformulation and refinement of the original principles. The process continues until the principles and rules derived from them achieve complete formal consistency. This process of feedback and refinement has the advantage of incorporating our most strongly held moral beliefs into a harmonic philosophical system in which they are given logical support. Rawls calls this process, similar to the "coherence theory"²⁸ of truth, "reflective equilibrium."²⁹

Although this process has the advantage of reinforcing and stabilizing the beliefs of a certain time period and may have an effect on future beliefs, it cannot claim to have reached independent truths because of the unproven nature of the fundamental premises. This is not a particularly strong criticism, however, because alternative theories do not have independently proven hypotheses either. An analysis of the assumptions made in Rawls's work illustrates how reflective equilibrium shapes the principles. For example, the veil of ignorance keeps the parties from a knowl-

their system of ends as far as possible. They do this by attempting to win for themselves the highest index of primary social goods, since this enables them to promote their conception of the good most effectively whatever it turns out to be. The parties do not seek to confer benefits or to impose injuries on one another; they are not moved by affection or rancor.

Id. at 144. The assumptions that the parties would not be moved by either envy or mutual interest probably result from Rawls's desire to avoid making characterizations of human nature which could not be proven and would lead to much criticism.

²⁷ As a first step, suppose that the basic structure of society distributes certain primary goods, that is, things that every rational man is presumed to want. These goods normally have a use whatever a person's rational plan of life. For simplicity, assume that the chief primary goods at the disposition of society are rights and liberties, powers and opportunities, income and wealth.

Id. at 62. Rawls also considers self-respect a primary good. *Id.*

²⁸ See Feinberg, *Justice, Fairness, and Rationality*, 81 YALE L.J. 1004, 1018-19 (1972), for a detailed analysis of Rawls's methodology and the coherence theory.

²⁹ When a person is presented with an intuitively appealing account of his sense of justice (one, say, which embodies various reasonable and natural presumptions), he may well revise his judgments to conform to its principles even though the theory does not fit his existing judgments exactly. He is especially likely to do this if he can find an explanation for the deviations which undermine his confidence in his original judgments and if the conception presented yields a judgment which he finds he can now accept. From the standpoint of moral philosophy, the best account of a person's sense of justice is not the one which fits his judgments prior to his examining any conception of justice, but rather the one which matches his judgments in reflective equilibrium.

J. RAWLS, *supra* note 1, at 48.

edge of their particular social position.³⁰ This assumption ensures that the principles of justice will not embody the concept of meritocracy.³¹ Thus, Rawls's primary assumptions and the process and content of the parties' bargaining in the original position are subject to the traditional objection that the validity of the consequences are not verifiable.

Rawls seeks to make his principles of justice consistent with the western historical experience and fundamental cultural values that have evolved in many societies. If labeling is helpful, it is safe to classify Rawls's theory as a right-based theory, in that the social system is fashioned primarily to accommodate the rights of individuals, in contrast to a duty-based (Kantian) or goal-based (utilitarian) theory. Rawls's construction of a theory of justice, premised upon rational persons bargaining behind a veil of ignorance in a manner similar to modern game theory,³² seeks to establish objective standards of justice to escape the utilitarian dilemma of possible subjection of individual liberty to a subjective standard of collective utility. His theory, can also be classified as based on "want-regarding" principles (as opposed to "ideal-regarding" principles) due to the assumption that rational men would try to create a system which would give them as many primary goods as possible.³³

Rawls's assumptions and methodology place his theory somewhere near the natural law theories of justice since he assumes that certain qualities — principally the ability to engage in a common rational process — are inherent in every person and seeks to establish objective criteria

³⁰ See text accompanying notes 21–23 *supra*.

³¹ Rawls argues that meritocracy would only be eliminated in the case of a democratic interpretation of his two principles: "[A] meritocratic society is a danger for the other interpretations of the principles of justice but not for the democratic conception." J. RAWLS, *supra* note 1, at 107. The argument is that the parties in the original position, being under the veil of ignorance, would never agree to principles which would lead to a meritocratic society, since they would not want to create a system where less talented people, perhaps themselves, would be disadvantaged. See M. YOUNG, *THE RISE OF MERITOCRACY* (1958).

The fact that Rawls's principles of justice would preclude a meritocratic society is a substantial departure from many of the other theories of distributive justice and has brought about much of the criticism of Rawls. See Dworkin, *The Original Position*, 40 U. CHI. L. REV. 500 (1973). Dworkin essentially argues that fairness of the contract made under the veil of ignorance does not necessarily constitute an independent argument for the fairness of its enforcement when the parties later actually know their talents and strengths. This argument assumes that a society which does not reward merit must necessarily be unfair, but such assumption is contrary to Rawls's theory and does not contain an independent argument for its validity. Dworkin should have attacked the veil of ignorance and not the fairness of the contract. Dworkin in fact states:

The fact, therefore, that a particular choice is in my interest at a particular time, under conditions of great uncertainty, is not a good argument for the fairness of enforcing that choice against one later under conditions of much greater knowledge.

Id. at 503.

³² In game theory, parties with competing interests try to maximize the outcome of their choice in view of the fact that they know the alternatives available to the other competing players. They are therefore forced to make decisions which will maximize their minimum outcome. Each player will try to improve his position while trying to put the other players in the worst position. The theory has been developed both for deterministic and, to some extent, probabilistic games. See A. RAPOPORT, *TWO-PERSON GAME THEORY* (1966); A. RAPOPORT, *N-PERSON GAME THEORY* (1970).

³³ B. BARRY, *THE LIBERAL THEORY OF JUSTICE* 19–33 (1973) (detailed analysis of the implications of Rawls's assumption about primary goods).

for a standard of justice. The word *natural* has unpleasant metaphysical associations for some, and others think that natural rights are "spectral attributes worn by primitive men like amulets, which they carry into civilization to ward off tyranny."³⁴ It would be a mistake, however, to think that the original position and the principles derived from it are simply part of a hypothetical game, an irrational appeal to emotion, or a romantic appeal to man in the "natural" state before "original sin." Rawls seems to assume that inherent both in our capacity to reason about morality and in the psychological processes of decision making is a common though process which dictates the establishment of a right-based theory of justice.³⁵

B. The Two Principles of Justice

Rawls postulates that the parties in the original position would choose two principles which, after a process of refinement through their use, would read as follows:

First Principle:

Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all.³⁶

Second Principle:

Social and economic inequalities are to be arranged so that they are both:

- (a) to the greatest benefit of the least advantaged, consistent with the just savings principle,³⁷ and
- (b) attached to offices and positions open to all under conditions of fair equality of opportunity.³⁸

The application of these two principles is regulated by a priority rule:

The principles of justice are to be ranked in lexical order and therefore liberty can be restricted only for the sake of liberty.³⁹

³⁴ Dworkin, *supra* note 31, at 527.

³⁵ "It seems fair to assume . . . that the . . . theory behind the original position must be a right-based theory of some sort." *Id.*

³⁶ J. RAWLS, *supra* note 1, at 250, 302. This final formulation of the first principle represents a refinement of the first formulation which reads:

First: each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others.

Id. at 60.

³⁷ The just savings principle deals with the distribution of wealth among generations. See note 64 *infra*.

³⁸ J. RAWLS, *supra* note 1, at 302. The original formulation of the second principle reads:

Second: social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone's advantage, and (b) attached to positions and offices open to all.

Id. at 60.

³⁹ *Id.* at 250. The "serial" or "lexical" order is an order which requires us to satisfy the first principle in the ordering before we can move on to the second, the second before we can consider the third, and so on. A principle does not come into play until those previous to it are

The priority rule expresses the concept that the second principle of justice cannot be applied until the first principle is satisfied; that is, economic rearrangements cannot occur if they would lead to a restriction of basic liberties.⁴⁰ The priority of liberty in Rawls's work has been the subject of much analysis and criticism.⁴¹ Most commentators seem to agree that the basic problems with the priority rule are that not all basic liberties are on the same level, that some may not require as much protection as others, and that it may at times be necessary to limit some liberties for the sake of economic benefits to society in general.⁴² The priority rule is nevertheless quite defensible because it maintains individual liberty and, in reality, it is difficult to envision probable counterexamples where serious limitations of basic liberties would be necessary to achieve much greater economic benefit to society.

Since this article is concerned primarily with principles of distributive justice, the implications of the first principle will be analyzed only to the extent that they affect the distribution of wealth.

1. The First Principle — Rawls defines the "basic liberties" as being, roughly speaking, political liberty (the right to vote and to be eligible for public office) together with freedom of speech and assembly; liberty of conscience and freedom of thought; freedom of the person along

either fully met or do not apply. A serial ordering avoids, then, having to balance principles at all; those earlier in the ordering have an absolute weight, so to speak, with respect to later ones, and hold without exception.

Id. at 43.

⁴⁰ These principles are to be arranged in a serial order with the first principle prior to the second. This ordering means that a departure from the institutions of equal liberty required by the first principle cannot be justified by, or compensated for, by greater social and economic advantages. The distribution of wealth and income, and the hierarchies of authority, must be consistent with both the liberties of equal citizenship and equality of opportunity.

Id. at 61.

⁴¹ See B. BARRY, *supra* note 33, at ch. 4. In his detailed analysis Barry says: Rawls gives little usable guidance about the way to aggregate the different liberties so as to arrive at an estimate of the total amount of liberty generated by alternative combinations of these different liberties . . .

Id. at 34. Barry does not agree with the rigidity of the priority principle and feels that rational men would not bind themselves to such a strict rule without leaving some leeway for adjustment of conflicting demands. See *id.* at 39. Also, see Feinberg, *supra* note 28, at 1028-30. Feinberg does not agree with the priority rule because he feels that there are certain cases where it would be more unjust to follow the priority rule than to disregard it.

Is it necessarily unjust for example, for a government in certain circumstances to concentrate on elimination of extreme economic inequalities between the rich and the starving even at the cost of a modest or temporary suspension of some of the lesser basic liberties? . . . No doubt middle class refugees from the tyrannies of Mao and Castro feel that they have been treated not only harshly but unfairly, and Rawls' theory gives them solid support. But apologists for Mao and Castro sometimes reply that it would have been unfair . . . to the starving and backward masses . . . not to have expropriated the middle class and put it [(the capital)] to work.

Id. at 1029. Of course a situation like Batista's Cuba would not occur in a Rawlsian system and therefore the transitional problem with which Feinberg is concerned may fairly be said not to be covered by Rawls's theory.

For further analysis and criticism of the priority rule, see Brock, *The Theory of Justice*, 40 U. CHI. L. REV. 486, 491, 493 (1973); Hart, *Rawls on Liberty and Its Priority*, 40 U. CHI. L. REV. 534, 551-55 (1973).

⁴² See authorities cited note 41 *supra*.

with the right to hold (personal) property; and freedom from arbitrary arrest and seizure as defined by the concept of the rule of law.⁴³

If an assumption of the primacy of individual rights is the basis for constructing a model of justice by which to measure the justness of social institutions, the paradigm requires a set of defined individual rights which may not be infringed in the name of greater social and economic advantage. Except for the priority rule and the extent to which Rawls recognizes property ownership as a fundamental right, the particular basic rights enumerated by Rawls are subject to metaphysical debate beyond the scope of this discussion.

Rawls initially limits the right to hold property to personal property.⁴⁴ The parties in the original position, however, not knowing their social position, would not necessarily agree to a principle which would allow private ownership of real property. Presumably, Rawls would allow ownership of personal property merely as a matter of assumed psychological imperatives, convenience, or practicality, but the same reason which would preclude the holding of real property should also prohibit ownership of personal property in the form of investments and eliminate all forms of inheritance or bequest. If inheritance were allowed, some people would be economically advantaged at birth without granting any corresponding economic benefit to society at large. Rawls chooses not to carry the implications of the veil of ignorance to their logical conclusion, however, and so allows heavily taxed inheritance.⁴⁵

Although Rawls does not consider private ownership of real property in his first formulation of the two principles, in their implementation he allows not only ownership of the means of production but also private ownership of natural resources.⁴⁶ Such ownership would seem wholly inconsistent with the original position, but Rawls neglects to explain how the original contract could be so modified.

2. The Second Principle — The core of a just distributive system in Rawls's conception is embodied in the second principle.⁴⁷ This principle

⁴³ J. RAWLS, *supra* note 1, at 61.

⁴⁴ See Hart, *supra* note 41, at 536-42 for an in-depth analysis of the implication of Rawls's assumptions about basic liberties.

⁴⁵ While dealing with the distribution branch of the government, note 101 *infra* and accompanying text, Rawls imposes inheritance taxes:

[The distribution branch] imposes a number of inheritance and gift taxes, and sets restrictions on the rights of bequest. The purpose of these levies and regulations is not to raise revenue (release resources to government) but gradually and continually to correct the distribution of wealth and to prevent concentrations of power detrimental to the fair value of political liberty and fair equality of opportunity.

J. RAWLS, *supra* note 1, at 277.

⁴⁶ See *id.* at 275.

⁴⁷ The analysis of the second principle is more complex simply because it is difficult to understand fully its implications and the manner in which the principle is affected by the assumptions made in the original position. In his analysis of the second principle, Rawls compares its implications with classical (*id.* at § 30) and average (*id.* at §§ 27-28) utilitarianism and intuitionism (*id.* at § 7), all of which he criticizes as being unjust or inefficient.

regulates the practical aspects of the institutional devices for determining the distribution of social and economic inequalities. Distribution decisions are to be made not through an application of the principle to specific cases but through a legislative process and institutions created in conformity with the two principles. In this way, Rawls argues, the resulting distribution will be just since it is determined by justly structured institutions. Rawls assumes that the second principle will be carried out by adopting a free market economy.⁴⁸

Rawls's provisional formulation of the second principle is followed by an analysis of its operation, which results in a refinement of the principle. The first formulation reads:

[S]ocial and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone's advantage, and (b) attached to positions and offices open to all.⁴⁹

Before exploring the operation of the second principle, Rawls introduces the principle of efficiency.⁵⁰ This principle indicates that, given a certain set of constraints, that is, goods to be distributed, a distribution among a fixed number of individuals is efficient if a change in the distribution in order to put one or more individuals in a better position would put at least one other individual in a worse position. Obviously, once goods are distributed and individuals are no longer willing to trade goods they have received for goods held by others, the distribution is efficient.⁵¹ Rawls realizes that the principle of efficiency cannot give any indication whether the resulting distribution is just or not,⁵² but tries to prove that

⁴⁸ "I assume in all interpretations that the first principle of equal liberty is satisfied and that the economy is roughly a free market system, although the means of production may or may not be privately owned." *Id.* at 66.

⁴⁹ *Id.* at 60.

⁵⁰ *Id.* at 67-75. The principle of efficiency adopted by Rawls is essentially Pareto's Optimality Principle. See A. PAGE, *UTILITY THEORY* 38 (1968), for a translation of Pareto's relevant passages.

⁵¹ It should be noted that this formulation of the principle of efficiency is not extremely valuable; in fact, it only provides directives in an expanding economy. To explain its limitations, restrict the class of goods distributed to money and assume that the individuals would rather have more than less money. Any distribution of the available money, whatever it may be, is automatically efficient. In fact, each individual would be less satisfied with another arrangement where he would receive less money, and to improve one individual's position (give him more money), it would be necessary to deprive at least one other individual of some of the money he has received. The new distribution would therefore be less efficient than the previous one. Although any such distribution would be efficient in satisfying individual greed, nothing can be said about its efficiency in an economic or social sense. Distributions which may be efficient from the viewpoint of individual satisfaction may be very inefficient in terms of the well being of society at large.

The principle of efficiency assumes much greater significance when it is applied to the configuration of production systems. "The organization of production is efficient if there is no way to alter inputs so as to produce more of some commodity without producing less of another." J. RAWLS, *supra* note 1, at 67. It is possible, given a certain amount of input commodities, to increase one or more output commodities with a more efficient configuration without violating the principle of efficiency.

⁵² There are, I shall assume, many efficient arrangements of the basic structure. Each of these specifies a particular division of advantages from social cooperation. The problem is to choose between them, to find a conception of justice that singles out one of these efficient distributions as also just.

Id. at 70-71.

an application of the second principle will lead to a distribution that is both efficient and just. Noting "that the principle of efficiency cannot serve alone as a conception of justice,"⁵³ Rawls considers systems in which the operation of the principle of efficiency would produce a just distribution. After rejecting systems of natural liberty, natural aristocracy, and a liberal interpretation of the principle of efficiency,⁵⁴ Rawls adopts a democratic interpretation of the second principle and introduces the "difference principle."⁵⁵

The democratic interpretation . . . is arrived at by combining the principle of fair equality of opportunity with the difference principle. This [latter] principle removes the indeterminateness of the principle of efficiency by singling out a particular position from which the social and economic inequalities of the basic structure are to be judged . . . [T]he higher expectations of those better situated are just if and only if they work as part of a scheme which improves the expectations of the least advantaged members of society.⁵⁶

Rawls explains the difference principle by reference to an individual representing the lowest economic class, the least advantaged man,⁵⁷ and one representing the uppermost class, the most favored man.⁵⁸ The difference principle requires, given a certain stock of social primary goods to be distributed, that any increase in the quantity of primary goods distributed to the most favored man also increase the benefits and advantages to the least advantaged man. Rawls realizes that primary goods cannot be easily measured since some, such as self-respect, cannot be measured quantitatively, but considers the difference principle to be efficient even though he is not dealing with a classically constrained function.⁵⁹ Since measurable primary goods, such as wealth, interact with nonmeasurable ones, such as power and self-respect, a change in the distribution of wealth, for example, could also change the total amount of self-respect or

⁵³ *Id.* at 71.

⁵⁴ Rawls first considers a system where the only concern is efficiency (*i.e.*, one individual with all of the goods, the rest with none), but rightly concludes that such an arrangement would not be just. *Id.* at 71. Rawls then considers a system of "natural liberty" in which distribution is regulated by natural talents, but rejects it because "the most obvious injustice of the system of natural liberty is that it permits distributive shares to be improperly influenced by these factors [natural talents and social position] so arbitrary from a moral point of view." *Id.* at 72. The third method of distribution Rawls considers is one based on what he calls the "liberal interpretation." *Id.* at 73. In this system the distribution is based on talents but is qualified by the assumption that everyone has an equal opportunity to develop his talents regardless of social position. This system is rejected because "it still permits the distribution of wealth and income to be determined by the natural distribution of abilities and talents." *Id.* at 73-74. After rejecting a system of "natural aristocracy" (*id.* at 74-75), Rawls concludes that a "democratic interpretation is the best choice." *Id.* at 75.

⁵⁵ For Rawls's interpretation of the difference principle, see *id.* at 76-80.

⁵⁶ *Id.* at 75.

⁵⁷ See *id.* at 78.

⁵⁸ See *id.* at 76.

⁵⁹ In defining the principle of efficiency (see notes 50, 51 *supra* and accompanying text), it is assumed that there exists a finite and known quantity of goods (the quantity and types of goods represent the constraints of the distribution function) to be distributed. *Id.* at 67.

power, thus affecting the constraints. This was not the case in the classical definition of the principle of efficiency; in the classical definition, different distributions of goods does not per se generate additional goods.

One of the unsolved problems with respect to the difference principle is who is to make the judgment as to when increases in the distribution of goods to the most favored man may result in a decrease in the benefits to the least advantaged man. If the least advantaged man is to be the decision maker, probably no increase in the distribution to the most favored man would be allowed since, for example, an increase in wealth might not compensate for the least advantaged man's loss of self-esteem. On the other hand, if the decision maker is an independent entity and the distribution is considered efficient when it increases the benefits to society as a whole, the least advantaged man may consider the resulting distribution unsatisfactory although the independent decision maker considers it beneficial. If the decision maker were the least advantaged man, therefore, the resulting efficient distribution would not likely be an economically efficient distribution.

A second problem with the difference principle is that it seems to operate in a vacuum. In a real situation, it is hard to imagine an increase in the distribution of goods either to the most favored or to the least advantaged man without either increasing the amount of resources available or redistributing the presently available ones. Since any redistribution of presently available resources would almost certainly violate the principle of efficiency,⁶⁰ new resources would have to be made available. But these new resources could be made available and distributed in such a way as to favor the upper classes greatly and the lower classes only marginally. This distribution would be "to everyone's advantage," but would not satisfy any intuitive sense of justice. Thus, the provisional formulation of the second principle could be satisfied by very unjust distributions. Moreover, an increase in the distribution of goods could result in an advantage to all of the presently existing representative classes but might not satisfy the principle of efficiency with respect to the distribution of goods among generations.

Rawls is aware of these limitations and is also aware that the difference principle cannot be applied to satisfy the principle of efficiency if one is operating on an unjust distribution. He responds to the problem by stating that

if the basic structure is unjust, these principles will authorize changes that may lower the expectations of some of those better off; and therefore the democratic conception is not consistent with the principle of efficiency if this principle is taken to mean that only changes which improve everyone's prospects are allowed. Justice is prior to efficiency and requires some changes that are not efficient in this sense. Consis-

⁶⁰ With a fixed amount of resources, giving more to some individuals would decrease the amount formerly possessed by other individuals. This would violate the principle of efficiency (with fixed constraints) since some people would have less than they had before. See text accompanying notes 50, 51 *supra*.

tency obtains only in the sense that a perfectly just scheme is also efficient.⁶¹

The second principle does not suggest how to transform an unjust distributive system into a just one. Its application to ongoing systems is therefore problematic, and a redistribution in any existing society might have to be carried out on an empirical basis. Some independent principle, not yet conceptualized by Rawls, would be required as the basis for the achievement of the initial just distribution.

The fact that the second principle operates only on already just systems is not fatal to the theory. If the social contract theory and the concept of the original position are accepted, it is apparent that the bargaining parties would be primarily concerned with deriving principles of justice for the regulation of a just system rather than for the correction of an unjust system. The parties in the original position would not necessarily know what kind of unjust systems already exist.

(a) *Second Formulation of the Second Principle*—To avoid the injustices which would result through the application of the provisional formulation of the second principle, Rawls reformulates the principle:

Social and economic inequalities are to be arranged so that they are both:

(a) to the greatest benefit of the least advantaged, consistent with the just savings principle, and

(b) attached to offices and positions open to all under conditions of fair equality of opportunity.⁶²

This second formulation recognizes that for a change in distribution to be just it must not only improve the expectations of the least advantaged man, but must also maximize such expectations. This recognition derives from the fact that, according to Rawls, lacking other considerations, preference should be given to an egalitarian system. As Rawls states:

All social primary goods—liberty and opportunity, income and wealth, and the bases of self-respect—are to be distributed equally unless an unequal distribution of any or all of these goods is to the advantage of the least favored.⁶³

The problem of justice between generations present in the first formulation of the second principle is mitigated by the introduction of the just saving rate.⁶⁴ The parties in the original position, having no knowledge

⁶¹ J. RAWLS, *supra* note 1, at 79–80.

⁶² *Id.* at 32. It should be noted that this formulation of the second principle does not satisfy the principle of efficiency since it does not require that each distribution be to everyone's advantage. Rawls does not pursue this problem.

⁶³ *Id.* at 303.

⁶⁴ The savings principle represents an interpretation, arrived at in the original position, of the previously accepted natural duty to uphold and to further just institutions. In this case the ethical problem is that of agreeing on a path over time which treats all generations justly during the whole course of a

of what generation they belong to, would try to determine a saving (or consumption rate of capital and natural resources that is just for all generations. Rawls assumes that "[t]he end of the savings process is set up in advance, although only the general outlines can be discerned. Particular circumstances as they arise will in time determine the more detailed aspects."⁶⁵ It has been argued that a maximization of the expectations of the least advantaged class would mean reduced investments and no just saving for future generations,⁶⁶ but this criticism appears unfounded because, according to the principle, such maximization cannot occur unless the just saving principle is satisfied.

The requirement that social and economic inequalities be arranged so that they will be to the greatest benefit of the least advantaged class and satisfy the just savings principle is very restrictive and in practice would allow only small deviations from a principle of equality. Perhaps the major obstacle in the application of the second principle is deciding what goods to take into consideration in the search for this maximum. Considering the distribution of tangible goods only, it is apparent that a maximization of the expectations of the least advantaged class can lead to a significant degree of economic disparity. In this case, however, it would be easy to show that a much larger share may have to go to the upper classes in order for the lower classes to maximize their economic expectations. If, on the other hand, a distribution of all primary goods is considered, the application of the second principle becomes practically unmanageable. The maximization of the benefits derived by the distribution of the primary goods to the least advantaged class cannot be easily measured. How does one maximize such intangibles as self-respect or power? Maximization of such things is as problematic as the maximization of the average utility in the utilitarian doctrine. But in spite of the difficulties, it seems to be a prerequisite to achieving justice to maximize the expectations with respect to the distribution of all primary goods. Consideration of the distribution of three primary goods, income, wealth, and self-respect, illustrates this point. If only the first two were distributed, the optimal distribution would be the one that produces the greatest income and wealth for the least advantaged class. This may require that wealth be concentrated in a few hands in order to allow entrepreneurial activities which would be beneficial to the lower classes in the form of income. But if self-respect is also considered, the distribution may be quite different. The least advantaged man may gain considerably more self-respect by knowing that his wealth is comparable to that of others than by having a greater income and being surrounded by people

society's history. What seems fair to persons in the original position defines justice in this instance as in others.

Id. at 289.

⁶⁵ *Id.*

⁶⁶ "[M]aximization of the income of the worst-off section of the population might entail spending nothing on investment, and this would make the next generation worse off than the current one." B. BARRY, *supra* note 33, at 43.

who are wealthier than he is. If the self-respect of the least advantaged group decreases as the economic gap between classes increases, the optimal distribution would tend to be egalitarian. The same arguments would apply to the distribution of power, so the central problem becomes a comparison of an increase in income with a decrease in self-respect or power.⁶⁷ Rawls solves this problem by assuming that self-respect is based primarily upon an equal availability of civil and political liberties.⁶⁸ This would alleviate the problem of the application of the second principle, but such a restrictive conception of self-respect seems too limited unless it is effectively translated into meaningful political power which eventually brings about just reform of distributive institutions.

To achieve an optimal distribution of goods, Rawls tries to optimize not the distribution of self-respect but the distribution of the bases of self-respect, but this approach fails to overcome the problems of weighing self-respect. If a clear relationship between the bases and self-respect is established or assumed,⁶⁹ then the distribution of bases is equivalent to some proportional distribution of self-respect. If that relationship is not established, a distribution of the bases per se is not logically supportable. This difficulty must be met by the establishment of a clear and verifiable relationship between the bases and the resulting amount of self-respect and not by what goods one chooses to distribute. Rawls's assumption that the relationship exists does not appear to be sufficiently justified.

The second principle deals not only with the proper distribution of goods, but requires that social and economic inequalities be arranged so that they are "attached to offices and positions open to all under conditions of fair equality and opportunity." Moreover, it is important to note that Rawls has a lexical order⁷⁰ within the second principle, as well as a lexical order between the first and second principles of justice which dictates that the principle of fair opportunity should be satisfied before the difference principle.⁷¹ Rawls rejects the view that some restrictions of

⁶⁷ The problems inherent in Rawls's approach are discussed by Barry:

'The equal distribution of self-respect is said to be provided for so long as civil and political liberties are equally available to all and so long as no one is 'debarred from competing for offices and positions carrying advantages of wealth or power . . . For Rawls, the obstacles to the achievement of equality of self-respect lie entirely in legally-prescribed inequalities of civil and political rights . . . That equality of self-respect may be as much or more hindered by inequalities of wealth or power themselves apparently does not occur to him.

Id. at 32.

⁶⁸ Rawls assumes that

[t]he basis for self-esteem in a just society is not then one's income share but the publicly affirmed distribution of fundamental rights and liberties. And this distribution being equal, everyone has a similar and secure status when they meet to conduct the common affairs of the wider society. No one is inclined to look beyond the constitutional affirmation of equality for further political ways of securing his status.

J. RAWLS, *supra* note 1, at 544.

⁶⁹ See note 67 *supra*.

⁷⁰ See note 39 *supra*.

⁷¹ The second principle of justice is lexically prior to the principle of efficiency and to that of maximizing the sum of advantages; and fair opportunity is prior to the difference principle. There are two cases:

opportunity are beneficial to society⁷² and, consistently with his central theme of rejecting maximization of utility as a worthwhile goal per se, views fair equality of opportunity as having value for its beneficial effect on the individual, independent of its efficiency.⁷³

C. Implementation of the Two Principles

The two principles and the priority rules are not devices for decision on a case by case basis; instead, they are to guide the formulation of a just constitution and just political and economic structures. Rawls divides the process of designing a global political and economic system into four stages.⁷⁴

1. The Stages of Implementation — The first stage is referred to as the constitutional convention.⁷⁵ In this stage there is a partial lifting of the veil of ignorance and although the participants still

do not know their own social position, their place in the distribution of natural attributes, or their conception of the good . . . [T]hey now

(a) an inequality of opportunity must enhance the opportunities of those with the lesser opportunity;

(b) an excessive rate of saving must on balance mitigate the burden of those bearing this hardship.

J. RAWLS, *supra* note 1, at 302-03.

⁷² Burke believed that the great families of the ruling stratum contribute by the wisdom of their political rule to the general welfare from generation to generation. Hegel thought that restrictions of equality of opportunity such as primogeniture, are essential to insure a landed class especially suited to political rule in virtue of its independence from the state, the quest for profit, and the manifold contingencies of civil society. Privileged family and property arrangements prepare those favored by them to take a clearer view of the universal interest for the benefit of the whole society.

Id. at 300.

⁷³ I should note that the reasons for requiring open positions are not solely, or even primarily, those of efficiency. I have not maintained that offices must be open if in fact everyone is to benefit from [such] an arrangement. For it may be possible to improve everyone's situation by assigning certain powers and benefits to positions despite the fact that certain groups are excluded from them. Although access is restricted, perhaps these offices can still attract superior talent and encourage better performance. But the principle of open positions forbids this. It expresses the conviction that if some places were not open on a basis fair to all, those kept out would be right in feeling unjustly treated even though they benefited from the greater efforts of those who were allowed to hold them. They would be justified in their complaint not only because they were excluded from certain external rewards of office such as wealth and privilege, but because they were debarred from experiencing the realization of self which comes from a skillful and devoted exercise of social duties. They would be deprived of one of the main forms of human good.

Id. at 84.

⁷⁴ [I]f several intermediate stages are imagined to take place in a definite sequence, this sequence may give us a schema for sorting out the complications that must be faced. Each stage is to represent an appropriate point of view from which certain kinds of questions are considered. Thus I suppose that after the parties have adopted the principles of justice in the original position, they move to a constitutional convention. Here they are to decide upon the justice of political forms and choose a constitution: they are delegates, so to speak, to such a convention. Subject to the constraints of the principles of justice already chosen, they are to design a system for the constitutional powers of government and the basic rights of citizens.

Id. at 196-97.

⁷⁵ *Id.* at 196.

know the relevant general facts about their society, that is, its natural circumstances and resources, its level of economic advance and political culture, and so on.⁷⁶

The reason for not lifting the veil of ignorance as to the social position of the parties is that the parties, assumed to be rational beings who seek their own self-interest, would incorporate into the constitution provisions which would favor their own condition. It is not as clear why the delegates to the constitutional convention would need information about their society's economic advance and political culture. If both the first and second principle and the priority rule have to be satisfied at any level of economic development, knowledge about the economic advance would not seem relevant to drafting a constitution. The constitution, presumably meant to incorporate more detailed principles which satisfy the two principles of justice, should not contain statutory provisions which are dependent on the society's economic level. Otherwise the constitution would be subject to change as the society's economy develops. The only possible justification for such economic knowledge would exist if the country has operated with a private or public economy; the delegates, having knowledge of the past performance, might wish to incorporate into the constitution one form or the other. Rawls considers a just constitution to be "the constitution that satisfies the principles of justice and is best calculated to lead to just and effective legislation."⁷⁷

The second stage is legislative in nature. Rawls assumes that the representatives, who still have no knowledge about themselves,⁷⁸ would legislate by using the device of "reflective equilibrium."⁷⁹ "Statutes must satisfy not only the principles of justice but whatever limits are laid down in the constitution. By moving back and forth between the stages of the constitutional convention and the legislature, the best constitution is found."⁸⁰

During the third stage, a stage of actual legislation, the veil of ignorance is totally lifted.⁸¹ While the first principle served as the primary standard for the delegates to the constitutional convention,

[t]he second principle comes into play at the stage of the legislature. It dictates that social and economic policies be aimed at maximizing the long-term expectations of the least advantaged under conditions

⁷⁶ *Id.* at 197.

⁷⁷ *Id.* Rawls defines broadly what should be incorporated into a just constitution: "[T]he liberties of equal citizenship must be incorporated into and protected by the constitution. These liberties include those of liberty of conscience and freedom of thought, liberty of the person, and equal political rights. The political system, which I assume to be some form of constitutional democracy, would not be a just procedure if it did not embody these liberties.

Id. at 197-98.

⁷⁸ Proposed bills are judged from the position of a representative legislator who, as always, does not know the particulars about himself. *Id.* at 198.

⁷⁹ See notes 28, 29 *supra* and accompanying text.

⁸⁰ J. RAWLS, *supra* note 1, at 198.

⁸¹ "At this point the full range of general economic and social facts is brought to bear." *Id.* at 199.

of fair equality of opportunity, subject to the equal liberties being maintained.⁸²

The last stage is that of the application of rules to particular cases by judges and administrators, and the following of rules by citizens generally. At this stage everyone has complete access to all of the facts.⁸³

Rawls argues that the best implementation of the two principles of justice can be obtained through a democratic process,⁸⁴ but his legislative process for the implementation of just laws differs substantially from the usual democratic process. Instead of reaching agreements through a process similar to the ideal free economic market regulated by competing forces, he argues that "[t]he legislative discussion must be conceived not as a contest between interests, but as an attempt to find the best policy as defined by the principles of justice."⁸⁵ Thus, legislators are expected to represent the best interests of all citizens, as defined by the principles of justice, rather than the interests of a particular group or geographic area.

Rawls's belief that the ideal legislative process, where the representatives try to fulfill the requirements of the principles of justice rather than pursuing their specific interests, is superior to the competitive political process is not surprising, but the critical issue is whether the legislators would operate in the ideal fashion. This ideal behavior, amounting to total objectivity even when the individual knows all of the facts regarding his position is in sharp contrast to the assumptions made in the original position that parties would pursue their own interests and must have no mutual interests. Although Rawls argues that his principles of justice would lead people to behave so as to insure stability to the system,⁸⁶ it is hard to conceive how a desire to maintain stability would lead legislators to operate in a disinterested fashion, particularly when such behavior would require a complete reversal of the "mutual-disinterestedness" assumption.⁸⁷ In view of these difficulties, Rawls admits that "[t]here seems

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.* at 65, 75.

⁸⁵ *Id.* at 357. Rawls expressly rejects the theory of a competitive legislative process. A free market system may lead to optimal solutions in the economic field, but in the legislative process the goal is justice and not efficiency. He says:

So far at least there does not exist a theory of just constitutions as procedures leading to just legislation which corresponds to the theory of competitive markets as procedures resulting in efficiency. And this would seem to imply that the application of economic theory to the actual constitutional process has grave limitations insofar as political conduct is affected by men's sense of justice, as it must be in any viable society, and just legislation is the primary social end.

Id. at 360-61.

⁸⁶ [M]embers [of a society] have a strong and normally effective desire to act as the principles of justice require. Since a well-ordered society endures over time, its conception of justice is presumably stable: that is, when institutions are just (as defined by this conception), those taking part in these arrangements acquire the corresponding sense of justice and desire to do their part in maintaining them.

Id. at 454.

⁸⁷ See note 26 *supra*.

to be no way to characterize a feasible procedure guaranteed to lead to just legislation."⁸⁸ Although it is not necessary to dwell on this particular aspect of the theory, it appears inevitable that if the ideal legislative process does not become a reality,⁸⁹ the implementation of the second principle of justice would falter. The resulting social system might provide a great deal of liberty without the required distributive justice. The American experience of a legislative process which has evolved to represent vested economic interests and defined geographic constituencies may provide a good example of exactly those consequences.

2. *The Distribution Branches* — One of the outcomes of the constitutional convention and of the legislative process is the creation of a number of institutions, which, through a just procedural scheme, would determine the proper allocation and reallocation of resources so as to implement a just distributive system. The scheme Rawls suggests makes considerable use of market arrangements⁹⁰ and assumes that there is or should be private ownership of capital and natural resources.⁹¹

As argued previously, the parties in the original position, under the particular veil of ignorance chosen by Rawls, would not necessarily choose a system allowing private ownership of real property, much less one allowing private ownership of natural resources.⁹² This would defeat Rawls's theory that people should not be penalized by their particular situation at birth. Even though it can be argued that the maximization of the expectations of the lower classes required by the second formulation of the second principle would require such ownership, that solution would result in conditions and injustices that would not have been agreed upon in the original position.

Rawls divides government institutions dealing with distributive justice into four branches. The allocation branch⁹³ would keep the market competitive and impede accumulation of excessive power. The stabilization branch⁹⁴ would strive to bring about full employment. The transfer

⁸⁸ J. RAWLS, *supra* note 1, at 360.

⁸⁹ Rawls's theory does not provide the support for such an outcome. The ideal legislative process is a desirable feature, but there is little reason to believe it would become a reality in a Rawlsian society. The actual legislative process thus represents the weak link in the chain of implementation of the second principle. The problem of how to achieve just legislation through a democratic process remains unsolved.

⁹⁰ "It is only in this way, I believe, that the problem of distribution can be handled as a case of pure procedural justice." J. RAWLS, *supra* note 1, at 274.

⁹¹ "At the start I assume that the regime is a property-owning democracy . . ." *Id.* at 274. Rawls also develops his scheme assuming private ownership of capital and natural resources. *See id.* at 275.

⁹² *See* notes 44-46 *supra* and accompanying text.

⁹³ The allocation branch . . . is to keep the price system workably competitive and to prevent the formation of unreasonable market power . . . The allocation branch is also charged with identifying and correcting, say by suitable taxes and subsidies and by changes in the definition of property rights, the more obvious departures from efficiency caused by the failure of price to measure accurately social benefits and costs.

J. RAWLS, *supra* note 1, at 276.

⁹⁴ "The stabilization branch . . . strives to bring about reasonably full employment in the sense that those who want work can find it and the free choice of occupation and the deployment of finance is [sic] supported by strong effective demand." *Id.*

branch⁹⁵ would set a social minimum for the distribution of primary goods. The distribution branch⁹⁶ would preserve justice in the distributive shares by taxation and controls on property.

Although Rawls has chosen a free market system for the implementation of his system of procedural justice, he claims that in theory the two principles of justice could also be implemented by a liberal socialist regime where

the means of production are publicly owned and . . . firms are managed by workers' councils say, or by agents appointed by them. Collective decisions made democratically under the constitution determine the general features of the economy, such as the rate of saving and the proportion of society's production devoted to essential public goods.⁹⁷

One curious aspect of Rawls's approach is that he chooses a free market system and then proceeds to limit it so much that some of the features of a free market are lost.

Rawls favors a market system because he believes it is efficient⁹⁸ and easier than other systems to manage.⁹⁹ He demonstrates awareness of the limitations of a market system, however, since he suggests that it must be controlled through the allocation branch and that the actual distribution of wealth must be arranged through the use of the transfer and distributive branches. Evidently, the market system is not an efficient vehicle for carrying out the requirements of the second principle, at least in terms of the narrow economic meaning attached to that concept. Moreover, Rawls only briefly hints at the problem that a market system may not be an efficient means, or even compatible with, preserving the environment.¹⁰⁰ It seems inefficient to have the market system determine workers' wages and to then have the transfer branch supplement their income, unless the definition of efficiency includes broader values than mere qualified measures of economic efficiency. Nor does it seem logical to allow

⁹⁵ "The essential idea is that the workings of this branch takes [sic] needs into account and assigns [sic] them an appropriate weight with respect to other claims. A competitive price system gives no consideration to needs and therefore it cannot be the sole device of distribution." *Id.*

⁹⁶ "Its task is to preserve an approximate justice in distributive shares by means of taxation and the necessary adjustments in the rights of property . . . [I]t imposes a number of inheritance and gift taxes, and sets restrictions on the rights of bequest." *Id.* at 277.

⁹⁷ *Id.* at 280. For an example of the implementation of this approach in an ongoing business enterprise, see E. SCHUMACHER, *SMALL IS BEAUTIFUL — ECONOMICS AS IF PEOPLE MATTERED* 256-75 (1973).

⁹⁸ Under certain conditions competitive prices select the goods to be produced and allocate resources to their production in such a manner that there is no way to improve upon either the choice of productive methods by firms, or the distribution of goods that arises from the purchases of households. J. RAWLS, *supra* note 1, at 271.

⁹⁹ "All regimes will normally use the market to ration out the consumption goods actually produced. Any other procedure is administratively cumbersome . . ." *Id.* at 270.

¹⁰⁰ Rawls argues that both a private property and a socialist system may be unsuited to handle this problem properly. *See id.* at 271.

the market system to create unnecessarily large accumulations of wealth which are then eliminated by the distribution branch.

The free market also does not allow efficient systems of production in areas where the demand for certain goods is below the optimal production size of one firm and competition would be detrimental to efficiency. In this situation, prices, entry, and allocation of resources would have to be controlled. This is but one example of how a pure market system, constrained only by resources supply and kept free by antitrust actions, is not efficient in the narrow economic sense.

The second principle requires that deviations from equality be allowed only when they are necessary to maximize the well being of the least advantaged class. The market system needs an incentive (presumably financial) in order to operate, and even if there were a distribution branch which eliminated excess wealth or gains, a certain level of disparity must exist in order to provide the necessary incentive. Thus, the market system mandates some distribution of wealth and a certain disparity between the least advantaged class and the most favored class.¹⁰¹ Whatever distribution system selected would be just only if it were impossible, by using an economic system other than the free market, to fashion another distribution system which is both more egalitarian and puts the least advantaged class in a better position. To prove that the free market system is the best alternative, Rawls would have to show that the level of incentive necessary to the operation of a free market represents the least possible differential from the lower class income of all the possible economic systems, and that the market system would, given the same resource allocation, achieve the best alternative for the lowest class when compared to all other systems.

Rawls's attempt to prove by default that a free market would lead to an optimal solution is unsatisfactory; but such proof is probably not within the realm of present knowledge. Inherent in such proof is the requirement that the cultural evolution of a society's view of the worth of the individual, the function of the state, the cultural values of a society, and the institutional structure for defining and distributing goods all be factored into a measurement of the society's efficient use of the free market concept.¹⁰²

Writing in the milieu of western political thought, Rawls is naturally influenced in his speculation about implementing the principles of justice by the political, economic, and social values of his society. Thus, Rawls's general principle for distributive justice reflects the prevailing values of a culture dedicated to the fragmentation of political and economic power in

¹⁰¹ It is impossible to know a priori what the distribution would be, but when the system is implemented one definite distribution will be obtained.

¹⁰² The effort to reduce economic analysis to a science in its narrowest sense requires the rejection of values incapable of quantification. Such a process not only produces flimsy "scientific" evidence upon what to regulate or predict human activity, but also ignores and prevents rational reflection upon the hidden metaphysical assumptions of such an approach. See E. SCHUMACHER, *supra* note 97, at 86-87.

society, equality of opportunity, protection of some level of private property ownership as an indispensable element of freedom, a written constitution, and a fundamental commitment to a free market economy, the excesses of which are to be curbed by the police power. Rawls's articulation of a principle of distributive justice captures the unstated assumptions of a just society which have emerged in the American experience. Moreover, the implementation of Rawls's theory would meet the crisis of a culture lacking a consistent or rational commitment to an ideal of distributive justice. Despite criticism of the theoretical implications of Rawls's theory in the vacuum of the hypothetical situation in which he writes, the application of his theory to the reality of modern America could be achieved with a minimal disruption of existing institutions and in a manner consistent with the cultural evolution of American social values. Thus, despite our differences with the theoretical arguments underlying the theory, we believe that Rawls has presented the best alternative for implementing a new sense of justice in a manner consistent with the values of our society, compatible with political realities, and within the framework of most of our existing institutions.

III. INSTITUTIONAL REFORMS IN LIGHT OF RAWLS'S THEORY OF DISTRIBUTIVE JUSTICE

Several basic institutions of American society are in need of reform if Rawls's principles of distributive justice are to be given even minimal effect. Unless these background institutions incorporate just principles in their structure and operation, any resulting distribution will be unjust.¹⁰³

A. Reform of the Political Process

Rawls emphasizes pure democracy as the essential ingredient for implementing his principles of justice through the legislative process.¹⁰⁴ Ideally, legislators should vote according to their own judgment and "attempt to find the best policy as defined by the principles of justice" without pressure from contending interest groups.¹⁰⁵ Rawls acknowledges that it may be impossible to guarantee this ideal,¹⁰⁶ the same ideal that the draftsmen of the United States Constitution¹⁰⁷ sought to achieve by fragmenting and controlling government power through the separation of powers,¹⁰⁸ establishing a bicameral legislature,¹⁰⁹ establishing a federal

¹⁰³ "[I]t is necessary to set the social and economic process within the surroundings of suitable political and legal institutions. Without the proper arrangement of these background institutions the outcome of the distributive process will not be just." J. RAWLS, *supra* note 1, at 275.

¹⁰⁴ See text accompanying notes 84-89 *supra*.

¹⁰⁵ See text accompanying note 85 *supra*.

¹⁰⁶ See text accompanying note 88 *supra*.

¹⁰⁷ James Madison's view of the nature of men was more pragmatic and cynical than Rawls's. In *THE FEDERALIST* No. 10, at 60 (J. Cooke ed. 1961) (J. Madison), Madison suggests that "the causes of faction cannot be removed; and that relief is only to be sought in the means of controlling its effects." See *id.* No. 51, at 347-48.

¹⁰⁸ *Id.* No. 9, at 50-51 (A. Hamilton); *id.* Nos. 47, 48 (J. Madison).

state,¹¹⁰ and adopting a written bill of rights as an integral part of the Constitution.¹¹¹ Rawls's ideal legislative process and the Framers' ideal of minimizing the ability of special interest groups to "unite and oppress the weaker"¹¹² have been undermined by the dependence of our elected representatives on excessive amounts of privately raised campaign funds. The vice of this impingement upon the ideal of pure democracy was well stated by Rawls:

Public resources have not been devoted to maintaining the institutions required for the fair value of political liberty. Essentially the fault lies in the fact that the democratic political process is at best regulated rivalry; it does not even in theory have the desirable properties that price theory ascribes to truly competitive markets. Moreover, the effects of injustices in the political process are much more grave and long lasting than market imperfections. Political power rapidly accumulates and becomes unequal; and making use of the coercive apparatus of the state and its law, those who gain the advantage can often assure themselves of a favored position. Thus inequities in the economic and social system may soon undermine whatever political equality might have existed under fortunate historical conditions. Universal suffrage is an insufficient counterpoise; for when parties and elections are financed not by public funds but by private contributions, the political forum is so constrained by the wishes of the dominant interests that the basic measures needed to establish just constitutional rule are seldom seriously presented.¹¹³

Distortions of many government resources allocations and wealth transfer decisions, made for special interest group gain at the expense of the least advantaged, are a direct product of the present state of campaign financing. The total expenditures in campaigns have jumped from \$200 million in 1964 to \$400 million in 1972,¹¹⁴ with the bulk of the money coming from wealthy individuals, large corporations and unions, and other well-heeled centers of economic power. The result is not only Watergate, the ITT and milk fund scandals, and soaring oil company profits, but also the treatment of poor people or the young who descend upon Washington to lobby for their interests as a dangerous rabble undeserving of basic political liberties. On the other hand, vested interest lobbyists

¹⁰⁹ It is a misfortune incident to republican government, though in a less degree than to other governments, that those who administer it, may forget their obligations to their constituents, and prove unfaithful to their constituents, and prove unfaithful to their important trust. In this point of view, a senate, as a second branch of the legislative assembly, distinct from, and dividing the power with, a first, must be in all cases a salutary check on the government.

Id. No. 62, at 418 (J. Madison).

¹¹⁰ *Id.* No. 51, at 352 (J. Madison).

¹¹¹ I. BRANELT, *THE BILL OF RIGHTS* 223 (1965).

¹¹² *THE FEDERALIST* No. 51, at 352 (J. Cooke ed. 1961) (J. Madison).

¹¹³ J. RAWLS, *supra* note 1, at 226.

¹¹⁴ Greene, *Who Should Pay for Political Campaigns?*, 12 COLUM. JOURNALISM REV. 24, 25 (Jan./Feb. 1974).

have immediate access to all levels of government and are listened to with deference. As a result, quite often only one side of an issue is heard and affirmative action is all but impossible to achieve if the interests of a major source of campaign funds are being threatened. Until the dependency of our present political system, particularly at the national level, on large sums of privately raised campaign funds is eliminated, the realization of a new ethic of distributive justice will not be accomplished through the political process. The present economic basis of our political process makes the process itself unjust since it frustrates the liberty of each citizen to exercise basic political rights, denies equal access to all, and clearly prevents institutional reform and the intelligent maximization of social and economic equality through the law-making function.¹¹⁵

Reform legislation recently adopted by Congress failed to adequately remedy the fundamental defect of political rivalry fueled by private financing.¹¹⁶ Partial reform was made in presidential elections by providing matching public financing with private financing, broader disclosure requirements, and limitations upon campaign expenditures. But the financing of congressional campaigns remains exclusively private. When coupled with the limitations upon campaign expenditures by both challengers and incumbents, the new legislation not only perpetuates the vice of private financing in legislative elections but also may be expected to provide incumbents with a decided advantage. Thus, the political forum will probably continue to be "constrained by the wishes of the dominant interests" seeking undue favor through the financing of political campaigns.

B. Distortions of Resource Allocation and Wealth Distribution Through the Tax System

The undermining of a just political system by tying entry and success to private financing has in turn undermined a second fundamental institution for maximizing distributive justice in society — a rational and fair tax and wealth transfer process. Rawls divides the function of taxation and allocation of revenues between different branches of government. The distribution branch is assigned the tasks of imposing taxes on inheritance to prevent an undue accumulation of wealth and creating a "scheme of taxation to raise the revenues that justice requires."¹¹⁷ Expenditure of the revenue raised to assure the maintenance of "a certain level of well-being and [to honor] the claims of need"¹¹⁸ is assigned to the transfer branch, while the maintenance of a competitive market system and full employment are the duties of the allocation and stabilization branches.¹¹⁹ It may

¹¹⁵ See D. NICHOLS, FINANCING ELECTIONS (1974).

¹¹⁶ Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263, amending 2 U.S.C.A. §§ 431-441, 451-454; 18 U.S.C.A. §§ 591, 600, 608, 610, 611; 7 U.S.C.A. §§ 312, 315, 802-805. For an analysis of the legislation, see 32 CONG. QUART. 2865-70 (1974).

¹¹⁷ J. RAWLS, *supra* note 1, at 278.

¹¹⁸ *Id.* at 276.

¹¹⁹ *Id.*

be unreasonable to expect a restructuring of current governmental institutions to conform literally to Rawls's proposed four branches of government. Yet the failure to clearly separate those functions Rawls assigns to the distribution branch and those functions he assigns to the transfer branch has undermined the rational, fair, and just implementation of the tax system and distorted the rational allocation of resources and distribution of wealth. Separation of some of these functions in the legislative process has generally taken place through the congressional committee process, although the distinction between taxation to raise revenue and deconcentrate wealth and the appropriation process has become blurred by the use of the progressive income tax system simultaneously to raise revenue, provide subsidies, and stimulate resource allocation decisions.

This confusion of objectives in enacting tax legislation has resulted in a progressive income tax system that is neither progressive nor a tax on income. Through a combination of special interest lobbying, ad hoc and simple minded use of the tax power to allocate resources and expend revenue through exemptions,¹²⁰ and a failure to assess the economic impact of the whole tax structure, the system has become a regressive tax upon the wage income of the middle and lower classes and a tax reward to the wealthy and nonwage earners. It has been estimated that the tax system allocates 2.2 billion dollars annually to the rich in the form of loopholes which exempt from taxation the income of the wealthiest one-half of one percent of the families in this country. Overall tax subsidies, in the form of deductions, exclusions, depreciation methods, and other indirect devices amounting to subsidies aggregate to approximately sixty to sixty-five billion dollars per year, one-fourth of the regular federal budget.¹²¹

Subsidies are buried in the Internal Revenue Code as exemptions, deductions, or credits and are not weighed in the appropriation process for what they are: a type of government appropriation in the form of a negative subsidy which provides an escape from or minimization of taxation with the direct effect of redistributing public wealth. For example, the oil depletion allowance is as much a government welfare program as government aid to dependent children; the deduction of interest paid for home mortgages from personal income taxes is as much a subsidy as direct foreign aid to Cambodia or Israel; the tax exemption for income realized from state and local bonds is as much a subsidy as direct federal grants to support the arts, child care centers, or the mentally ill; and provision for accelerated depreciation and the investment tax credit for business is as much a subsidy as food stamps for the poor and unemployment compensation for those out of work.

Without passing on the merits or equity of any particular indirect subsidy by exclusion from taxation, it is clear that providing government support or wealth transfers through indirect tax subsidies has several ad-

¹²⁰ See text accompanying note 123 *infra*.

¹²¹ S. SURREY, *PATHWAYS TO TAX REFORM* 7 (1973).

verse effects. For one thing, the executive branch, Congress, and the public do not generally recognize such subsidies for what they really are, nor do they appreciate the true magnitude of the social and economic impact of such wealth transfer decisions. Moreover, indirect subsidies are often hidden governmental expenditures or hidden wealth transfers at best; at worst, they are crude devices for achieving a particular governmental objective which become institutionalized beyond rational reform — particularly by a political process undermined by private funding — after the original objective has been achieved.

Incidents of generally unknown distributive injustice occur because of the complexity and hidden subsidy objectives of the income tax laws. Many of the wealthiest citizens pay no income taxes at all, while the poor pay a much higher percentage of their income in the form of taxes of all kinds than do the middle and upper classes.¹²² The present tax structure has been converted into one of the major purveyors of distributive injustice in our society principally because exclusions and preferences from taxation have not been justified on the basis that they are reasonably expected to be to everyone's advantage.¹²³ Many exist for precisely the opposite reason. Thus, for example, wealth earned from human labor is taxed at a higher rate than wealth accumulated from capital gains, both at the time earned and upon transfer at death. While it may be too simple to suggest a dollar is a dollar however it was earned, most of the Byzantine complexity of our tax system would be ended by abolishing the capital gains differential and by implementing any necessary incentive to invest risk capital through direct subsidy. The extent to which a tax differential could be justified should depend upon proof that the differential provides an incentive for entrepreneurs to invest risk capital for the long range benefits of all; that is, that the proverbial shower of benefits will trickle down to the lowest income earner because of the investment of capital in risky ventures. This theory does not correspond with reality since a very small share of corporate capital — less than two percent in the decade of the sixties¹²⁴ — is derived from the stock market. If some kind of subsidy is needed to encourage risk taking, a direct subsidy is a more refined manner of achieving the goal. Moreover, the nexus between the capital gains incentive and the actual use of the exemption has become extremely tenuous, as a vast army of tax experts has labored to broaden the definition of capital gains income to include cattle breeding and resort development room space sold as condominiums. The result is not only distributive injustice, but massive economic misallocations as investment decisions of excess capital are dictated by personal tax advantage rather than economic efficiency and social justice.

¹²² See P. STERN, *THE RAPE OF THE TAXPAYER* 5-29 (1973).

¹²³ See J. RAWLS, *supra* note 1, at 278-84, for his examination of the tax system.

¹²⁴ See P. STERN, *supra* note 122, at 117-18.

Tax inequalities can be justified where they are of benefit to all,¹²⁵ but the present structure and operation of the Internal Revenue Code is grossly unjust under any theory of distributive justice. If lawyers and economists fail to reform the system in a manner consistent with principles of individual distributive justice, injustices will continue to be perpetuated and the efficiency of the system — largely dependent upon voluntary compliance — may sooner or later be subject to total destruction by massive noncompliance. Destruction of the voluntary tax system will mean the destruction of one of society's best tools for rationally achieving distributive justice.

A first step in reforming the tax system should be a division of the process for enacting tax legislation into its revenue raising function and its appropriation function so that the latter does not overwhelm the former. Until this step is taken, further reform of the tax system and the appropriation process will be frustrated, and Rawls's ideal of a fair distribution of the burden of taxation and transfer of collective wealth in a manner consistent with the "difference principle"¹²⁶ will be beyond the reach of our system of government.

C. Institutional Structure of Large Corporations

A third area of crucially needed institutional reform central to a renewal of distributive justice in America is the redefinition of the nature of giant corporations, many of which are essentially multi-national political states.¹²⁷ Rawls does not directly examine the distributive justice implications of the institutional structure imposed by law on large corporations and the extent to which that structure deviates from the ideal of justice prescribed, or controls the evolution of other institutional devices of society for achieving distributive justice, or contributes to the maldistribution of wealth in society. However, Rawls's reformulation of the second principle

¹²⁵ Rawls advocates a "proportional expenditure tax," since it imposes a levy according to how much a person takes out of the common store of goods and not according to how much he contributes (assuming here that income is fairly earned). Again, a proportional tax on total consumption (for each year say) can contain the usual exemptions for dependents, and so on; and it treats everyone in a uniform way (still assuming that income is fairly earned). It may be better, therefore, to use progressive rates only when they are necessary to preserve the justice of the basic structure with respect to the first principle of justice and fair equality of opportunity, and so to forestall accumulations of property and power likely to undermine the corresponding institutions.

J. RAWLS, *supra* note 1, at 278-79.

¹²⁶ See text accompanying notes 55-59 *supra*.

¹²⁷ See H. STEPHENSON, *THE COMING CLASH* (1972); *THE MULTI NATIONAL FIRM AND THE NATION STATE* (G. Paquet ed. 1972). In a dissent to the dismissal of *certiorari* on grounds of mootness in *SEC v. Medical Committee for Human Rights*, 404 U.S. 403, 409 (1972) (the proxy litigation over Dow Chemical Company's refusal to submit a shareholder proposal requesting that Dow cease manufacturing napalm), Mr. Justice Douglas observed: "The modern super-corporations, of which Dow is one, wield immense, virtually unchecked, power. Some say that they are 'private governments,' whose decisions affect the lives of us all." See A. BERLE, *ECONOMIC POWER AND THE FREE SOCIETY* (1957); J. GALBRAITH, *THE NEW INDUSTRIAL STATE* (1967); Miller, *Toward the "Techno-Corporate" State? — An Essay in American Constitutionalism*, 14 VILL. L. REV. 1 (1968).

of justice bears on the giant corporation in that it requires a maximization of the expectations of the least favored individual, includes a just saving principle, and requires that inequalities be arranged so that they are attached to offices and positions open to all under conditions of fair equality of opportunity.¹²⁸ Since Rawls's first formulation of the principle provided for an economic system which satisfied the principle of efficiency but did not necessarily conform to his conception of justice,¹²⁹ it is unclear whether the large modern corporation, presumably efficient, would satisfy the first formulation of the principle. It is clear, however, that the structure of such institutions does not meet the requirements of the second formulation of the second principle. The modern "super-corporation" has "undermined the preconceptions of classical economic theory as effectively as the quantum undermined classical physics at the beginning of the twentieth century."¹³⁰ It has done so in a variety of ways. By virtue of dispersed stock ownership and the institutional power of entrenched management, the nature of the shareholders' property interest has changed from an entrepreneurial to an investment interest. Because of the separation of ownership and control¹³¹ and the wealth accumulation ability of large corporations, the proprietary interest of shareholders mandated by the law no longer equates with legal or economic reality.¹³² Management power has grown so much that management may accurately be characterized as a self-perpetuating oligarchy with generally unchecked power to make significant wealth transfer decisions.¹³³

The political, social, and economic costs of such enterprises are becoming increasingly apparent. Measured solely on a basis of economic efficiency, an illusory practice indulged in by an army of economists devoted to a form of scientism necessitating the exclusion of quantitatively unmeasurable costs,¹³⁴ many giant firms and their means of production,

¹²⁸ See text accompanying note 62 *supra*.

¹²⁹ See text accompanying notes 49-56 *supra*.

¹³⁰ Means, *Collective Capitalism and Economic Theory*, in *THE CORPORATION TAKE-OVER* 67 (A. Hacker ed. 1964). See E. SCHUMACHER, *supra* note 97, at 227-38.

¹³¹ See A. BERLE & G. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (2d ed. 1968).

¹³² See Flynn, *Corporate Democracy: Nice Work If You Can Get It*, in *CORPORATE POWER IN AMERICA* 94 (R. Nader & M. Green eds. 1973). Adolph Berle has asked: Why have stockholders? What contribution do they make, entitling them to heirship to half the profits of the industrial system, receivable partly in the form of dividends, and partly in the form of increased market values resulting from undistributed corporate gains? Stockholders toil not, neither do they spin, to earn that reward. They are beneficiaries by position only.

Berle, *Property, Production and Revolution*, 65 COLUM. L. REV. 1, 16 (1965). See Chayes, *The Modern Corporation and The Rule of Law*, in *THE CORPORATION IN MODERN SOCIETY* 25 (E. Mason ed. 1959).

¹³³ For example, one commentator attributes the 1956 recession in part to the manufacturing decisions made by the auto manufacturers. A. BERLE, *THE THREE FACES OF POWER* 31 n.2 (1967). Other estimates of management power in large corporations to extract excessive profits from consumers for corporate use run into the billions of dollars annually. See M. MINTZ & J. COHEN, *AMERICA, INC.* 124-50 (1971); B. Moore, *A Modest Proposal For The Reform of the Capitalist System*, 1974 (mimeo, Center for the Study of Capitalist Institutions).

¹³⁴ See Austin, *The Emergence of Societal Antitrust*, 47 N.Y.U.L. REV. 903 (1972); note 102 *supra*.

management, and levels of technology appear to offer society quantum increases of economic benefits. The failure to include externalities such as pollution, psychological and physical damage to employees, and the loss of other intangible values may misrepresent the true value of large size or the economic advantages of large investments necessitated by complex technology. For example, the market price and labor input to produce a ton of coal may be cut dramatically by the use of complex and expensive continuous mining technology. Continuous mining machines, however, may exact a terrible toll from those who must operate the machines, and strip mining exacts a major environmental cost for several generations.¹³⁵ These often substantial costs are usually externalized by virtue of the large firm's ability to shift them to the government in the form of welfare benefits for the human derelicts created or to subsequent generations and the ecosystem in the form of a bleak and polluted landscape. A form of risk shifting and wealth distribution takes place that is directly traceable to the political and social power inevitably lodged in the hands of large corporations with unchecked economic power. Unless and until the excessive political and economic power of concentrated industries and unions is brought under control, the measurement of economic efficiencies will remain a titillating but false exercise, and a more just distribution of society's wealth will be beyond the capability of our political processes.

Under Rawls's system, even if the giant corporation is efficient in a utilitarian economic sense, it might not satisfy the principle of justice because of the priority of justice over efficiency.¹³⁶ Large corporations no longer, and probably never did, fit the legal and economic models established for them, premised on roughly just distribution of benefits and burdens. The giant corporation is only theoretically owned by shareholders and managed by their elected representatives for a profit in a model of entrepreneurial symmetry. The shareholders do not own or control these corporations; they do not even contribute risk capital since most of the capital of super-corporations is internally generated through use of tax gimmicks or debt financing. Shares in such enterprises do not represent an investment of risk capital in the firm, but rather participation in the legalized gambling of the stock market. Officers and directors are not elected by shareholders, but constitute a self-perpetuating oligarchy answerable to no one. Large corporations have become perpetual wealth accumulation machines, owning over two-thirds of our productive wealth and wielding vast influence over our lives.¹³⁷ General Motors and two hundred other corporations with annual revenues in excess of one billion

¹³⁵ See statement of Arnold Miller, *Hearings on Controls or Competition, Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 92d Cong., 2d Sess., sec. 4, at 142 (1972) [hereinafter cited as *1972 Hearings*].

¹³⁶ See J. RAWLS, *supra* note 1, at 261; Nell, *The Fall of the House of Efficiency*, 409 ANNALS 102 (1973).

¹³⁷ See R. BARBER, *THE AMERICAN CORPORATION* (1970); M. MINTZ & J. COHEN, *AMERICA, INC.* (1971).

dollars should no longer be looked upon as benign economic endeavors, enveloped in the mystiques of free enterprise and private property. G.M.'s yearly operating revenues exceed those of all but a few countries; its sales receipts are greater than the combined revenues of New York, New Jersey, Pennsylvania, Ohio, Delaware and the six New England states; it employs in excess of 700,000 employees in 172 plants in forty-six countries.¹³⁸ Its political and economic power is so great that one observer has suggested that "General Motors could *buy* Delaware . . . if DuPont were willing to sell it."¹³⁹

The economic, political, and social consequences of the development of the modern corporation are coming under increased criticism elsewhere.¹⁴⁰ It is sufficient here to suggest that the giant corporation has become a principal engine of distributive injustice in our society and a growing threat to individual liberty. It has become such by distributing increments of wealth to those who have done nothing to earn that wealth, contrary to the original legal assumptions of the corporate institution; it has become a source of undue political and economic power on the national and international scene, and its internal organization is leading to a denial of individuality and a rebirth of status rights and liabilities reminiscent of feudalism.¹⁴¹ Philosophy, law, and economics have largely ignored the fundamental issues raised by the evolution of the modern super-corporation and continue to measure the operation and effects of the large corporation by the mythology of "free enterprise," "property rights," and the personification of the giant corporation in Adam Smith terminology. Measuring the modern corporation by Rawls's principle of equality quickly demonstrates how far it has departed from its original legal and economic base and underscores the need for restructuring the giant corporation in light of a more empirical examination of its economic and institutional effects. If restructuring is to take place, it must proceed upon a consideration of who should "own" the super-corporation, to whom and for what ends its management is responsible, what control devices are appropriate, and how to strike the proper balance between economic efficiency, human liberty, and distributive justice within its legal and economic structure.

D. Reform of the Competitive Process

A fourth institution in need of serious reform is the so-called free competitive market, which allocates resources and sets prices efficiently, while promoting maximum equal liberty and equality of opportunity.¹⁴² What-

¹³⁸ R. BARBER, *supra* note 137, at 19-20.

¹³⁹ Nader, *The Case for Federal Chartering*, in *CORPORATE POWER IN AMERICA* 67, 79 (R. Nader & M. Green eds. 1973).

¹⁴⁰ See E. SCHUMACHER, *supra* note 97; Flynn, *supra* note 132.

¹⁴¹ See Miller, *Courts and Corporate Accountability*, in *CORPORATE POWER IN AMERICA* 198 (R. Nader & M. Green eds. 1973).

¹⁴² See J. RAWLS, *supra* note 1, at 270-74.

ever fundamental theory a particular society may choose to organize its economic affairs, it must recognize that

[h]ow men work together now to satisfy their present desires affects the desires they will have later on, [determines] the kinds of persons they will be. . . . Since economic arrangements have these effects, and indeed must do so, the choice of these institutions involves some view of human good and of the design of institutions to realize it. This choice must, therefore, be made on moral and political as well as on economic grounds.¹⁴³

Rawls adopts, as the guiding principle for the private sector, reliance upon "a system of markets in which prices are freely determined by supply and demand,"¹⁴⁴ while acknowledging that the operation of this free market concept does not necessarily require private ownership of the instruments of production.¹⁴⁵ In this way, Rawls sees a free market system as efficient in the economic sense and, "given the requisite background institutions . . . consistent with equal liberties and fair equality of opportunity."¹⁴⁶ Rawls does not adopt the market system as a philosophical imperative, but as a practical necessity for efficiently managing a complex economy.

There is considerable doubt as to the existence of a free market system — in the sense of free consumer choices dictating price and allocation decisions while maximizing equal liberties and fair equality of opportunity — in vast sectors of the American economy. Important segments of the economy are subsidized or regulated by the government, often at the instance of the industry regulated.¹⁴⁷ High levels of economic concentration exist in major segments of the nonregulated economy as well,¹⁴⁸ imposing inefficiencies, limiting equality of opportunity, and posing sub-

¹⁴³ *Id.* at 259–60. Theodore Rosak, in his introduction to Schumacher's book attempting to humanize economic thinking, captures the same thought:

He [Schumacher] reminds us that economics has only become scientific by becoming statistical. But at the bottom of its statistics, sunk well out of sight, are so many sweeping assumptions about people like you and me — about our needs and motivations and the purpose we have given our lives. Again and again Schumacher insists that economics as it is practiced today — whether it is socialist or capitalist economics — is a "derived body of thought." It is derived from dubious "meta-economic" preconceptions regarding man and nature that are never questioned, that dare not be questioned if economic science is to be the science it purports to be rather than (as it should be) a humanistic social wisdom that trusts to experienced intuition, plays by ear, and risks a moral exhortation or two.

E. SCHUMACHER, *supra* note 97, at 8.

¹⁴⁴ J. RAWLS, *supra* note 1, at 270.

¹⁴⁵ *Id.* at 271.

¹⁴⁶ *Id.* at 272.

¹⁴⁷ See THE MONOPOLY MAKERS (M. Green ed. 1973); W. ADAMS & H. GRAY, MONOPOLY IN AMERICA (1955).

¹⁴⁸ See J. BLAIR, ECONOMIC CONCENTRATION (1972); G. KAYSEN & D. TURNER, ANTITRUST POLICY; AN ECONOMIC AND LEGAL ANALYSIS (1959); CORPORATE POWER IN AMERICA (R. Nader & M. Green eds. 1972). See generally, *Hearings on Economic Concentration Pursuant to S. Res. 262 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 88th Cong., 2d Sess., pts. I–VIII (1964–1966).

stantial risks to the equality of individual liberties. One estimate has placed the "dead-weight welfare loss attributable to monopoly in the United States . . . somewhere between five-tenths and two percent of the gross national product . . ." ¹⁴⁹ Others have suggested that our inability to maintain full employment without excessive inflation through the "fine tuning" of monetary and fiscal policy is directly attributable to the existence of excessive market power in the economy, ¹⁵⁰ which subverts the economic advantage of efficiency upon which Rawls predicates his advocacy of a free market to govern economic arrangements. The current state of the United States and world economy and the maldistribution of wealth clearly suggest that the rough equilibrium of economic arrangements sought by competitive markets with the excesses curbed by rational governmental intervention to prevent waste has not been achieved.

The effects of unchecked economic power resulting from the destruction of workable competition by unwise government intervention in the market and the growth of giant corporations reach far beyond the economic inefficiencies and resource misallocations that artificial competitive models predict. The maintenance of a free market system has perhaps even more significance to the preservation of liberty and equality of opportunity, as Rawls acknowledges, ¹⁵¹ than to the efficient management of a complex technologically-based society. Where the unchecked growth of concentrated economic power converts the economy from one of free choice to dictated choice, individual mobility, freedom of choice, and individual liberty are greatly lessened. ¹⁵² Recent events in the political and economic sphere, when coupled with the pervasive scope of economic concentration in the American economy, clearly indicate the need either to reestablish a competitive market economy in the United States and other major areas of the world or to pay an ever increasing price in the form of resource misallocations, arbitrary wealth transfers, overall economic inefficiencies, and a decline in equality of opportunity and individual liberty.

IV. CONCLUSION

We have attempted to analyze the distributive aspects of Rawls's theory of justice and to highlight some basic institutions of our society in need of fundamental reform in light of the theory. By emphasizing the institutional implications of the distributive aspects of Rawls's work, an examination of other important aspects of his truly impressive exposition of a rationally based and affirmatively stated theory of justice must be abjured. By attempting a comprehensive exposition of the theory and the philo-

¹⁴⁹ F. SCHERER, *INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE* 404 (1970).

¹⁵⁰ *Hearings on The Industrial Reorganization Act Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess., pt. 1, at 45 (1973) (statement of W. Mueller).

¹⁵¹ J. RAWLS, *supra* note 1, at 272.

¹⁵² See 1972 *Hearings*, *supra* note 135; Blake & Jones, *In Defense of Antitrust*, 65 COLUM. L. REV. 377 (1965); Miller, *supra* note 127.

sophical assumptions underlying the process of analysis and the conclusions reached, Rawls's work constitutes a substantial contribution to law and philosophy and is certain to provoke constructive thought and criticism of far reaching consequences.¹⁵³

We have isolated Rawls's concept of distributive justice in the hope that an examination of this aspect of his work may help provide insights to enable the intelligent reform of significant institutions in our society which have gone awry. We have lost a consensus on an ethic of distributive justice in our culture and, as a result, we risk sinking into a new form of feudalism where the rights and dignity of the individual are made subservient to monolithic institutions, a political or economic elite, or a mindless and onrushing technocracy. In grappling with the conundrum of preserving individualism in an ever more complex and interdependent society, which is currently under great economic stress, we need a renewed consensus of justice — one which does not exalt efficiency,¹⁵⁴ meritocracy, or group utility as the primary end of social and economic justice. Rather, we need a consensus which guarantees just institutions capable of restricting inequalities to those inequalities for the reasonable benefit of all, while preserving individual liberty. John Rawls has provided us with rationally based principles by which relatively rapid and orderly progress to a just society may be made, progress which may avert dangers to civilization which exist in the present circumstances.

¹⁵³ The most recent critique is an exhaustive examination of Rawls's concept of law. Hermann, *The Fallacy of Legal Procedure as Predominant Over Substantive Justice: A Critique of "The Rule of Law" in John Rawls' A THEORY OF JUSTICE*, 23 DEPAUL L. REV. 1408 (1974).

¹⁵⁴ See Nell, *supra* note 136.